No. 75-699

SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

LEON GOLDFARB

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum and order of the district court (App. A, *infra*) are reported at 396 F. Supp. 308.

JURISDICTION

The order of the three-judge district court declaring portions of 42 U.S.C. 402 unconstitutional and directing the payment of benefits to the plaintiff was

entered on June 17, 1975. A notice of appeal to this Court (App. B, *infra*) was filed on July 15, 1975. The time for docketing the appeal was extended by order of Mr. Justice Marshall first to October 13, 1975, and then to November 12, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 11, n. 8.

QUESTION PRESENTED

Whether Section 202(f) of the Social Security Act, invidiously discriminates [redacted] by conditioning the payment of widower's insurance benefits upon a showing that the widower was dependent upon his wife for more than half his support, whereas widow's insurance benefits are payable without any such showing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 202(c) and (f) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(c) and (f), is set forth in App. C, *infra*.

STATEMENT

Appellee, after the death of his wife, applied to the Social Security Administration for widower's insurance benefits pursuant to Section 202(f) of the Social Security Act, 42 U.S.C. 402(f). His application was denied because he failed to establish, as required by Section 202(f)(1)(D), that he had been "receiving at least one-half of his support * * * from [his wife] at the time of her death * * * or * * * at the time she became entitled to old-age or disability insurance benefits * * *."[1]

Appellee then instituted this suit in the United States District Court for the Eastern District of New York, requesting that that dependency requirement be declared unconstitutional, on the ground that no similar showing of dependency is required as a condition of eligibility for widow's insurance benefits. A three-judge district court was convened pursuant to 28 U.S.C. 2282. The court granted the requested relief on the basis of this Court's decision in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, and *Frontiero* v. *Richardson*, 411 U.S. 677, and directed the Secretary of Health, Education, and Welfare to begin payment of widower's insurance benefits to appellee.

---

[1] The other conditions on eligibility for widower's insurance benefits are set forth in Section 202(f)(1)(A) to (E). In particular, the widower must have attained age 60 or, if disabled, age 50 and must not be entitled to old-age insurance benefits equal to or in excess of his deceased wife's primary insurance amount. See 42 U.S.C. (Supp. III) 402(f)(1)(B) and (E).

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the distribution of Social Security benefits to individuals of retirement age. The decision below misreads the significance of this Court's decisions in *Wiesenfeld* and *Frontiero* and is inconsistent in approach with *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975.[2] If the decision below, and certain related decisions,[3] are permitted to stand, the

[2] We do not, however, challenge the jurisdiction of the district court on the basis of *Salfi*. Although appellee did not seek administrative reconsideration of the initial denial of his application for widower's benefits, the Secretary has determined that further administrative review would have been futile and therefore that the initial denial was "final" for purposes of Section 205(g) of the Act. See *Salfi, supra*, slip op. 15. The Secretary is currently considering the promulgation of regulations that will specify the circumstances under which a decision denying benefits without a hearing will be treated as "final."

[3] The decision below is one of four recent district court decisions holding a dependency provision of Section 202 unconstitutional. In *Silbowitz* v. *Secretary of Health, Education, and Welfare*, S.D. Fla., Nos. 74-924-Civ-CF and 74-925-Civ-CF, decided June 20, 1975; *Coffin* v. *Secretary of Health, Education, and Welfare*, D.C. D.C., Civil Action No. 1890-73, decided July 14, 1975 and *Jablon* v. *Secretary of Health, Education, and Welfare*, D. Md., Civil No. K-74-739, decided July 28, 1975, the district courts held unconstitutional the analogous dependency provision with regard to husband's insurance benefits under Section 202(c). The Solicitor General has authorized the docketing of appeals in all four cases.

Husband's insurance benefits are payable to men of retirement age whose wives are receiving old-age or disability insurance benefits, upon the showing that the husband was receiving at least one-half of his support from his wife at the time of her retirement or disability, and that he is not entitled

Secretary will be required to pay approximately $400 million in additional benefits annually.[4] This added cost will impose a severe burden on the Social Security trust fund's already strained resources. In these circumstances, plenary consideration by the Court is warranted.

In *Salfi*, this Court reconciled its holdings concerning classifications in social welfare legislation. It held that the pertinent analysis of such legislation under the Due Process Clause is whether "the statute manifests a patently arbitrary classification, utterly lacking in rational justification" (slip op. 16, quoting from *Flemming* v. *Nestor*, 363 U.S. 603, 611). In establishing special insurance benefits for widows and widowers, and for certain wives and hus-

to old-age insurance benefits equal to or in excess of one-half his wife's primary insurance amount. Section 202(c)(1)(C) and (D). Since the considerations that bear upon the constitutionality of the dependency conditions for husband's insurance benefits and widower's insurance benefits appear to be identical, we here discuss the substantiality of the question presented in the context of both sets of cases.

[4] This estimate is provided by the Social Security Administration and is based upon actuarial predictions of the additional number of men who will qualify for husband's or widower's insurance benefits under the district courts' decisions. A large proportion of the men who will be so affected are current or retired public employees who are otherwise covered by federal, state, or municipal pension plans, rather than by Social Security. Most other nondependent husbands or widowers would be ineligible for such benefits for the independent reason that their own entitlement to old-age insurance benefits would exceed the maximum amount prescribed by Sections 202(c)(1)(D) and (f)(1)(E). See notes 1 and 3, *supra*.

bands of retired beneficiaries, Congress intended to make benefits available to men and women of retirement age on the basis of their dependency on the earnings of their spouses. Those benefits "are available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility." *Salfi*, *supra*, slip op. 20. The statutes at issue here thus fully satisfy the requirements of the Constitution.

Section 202 requires a male of retirement age who applies for benefits on the basis of his wife's earnings account to demonstrate that he is entitled to lesser old-age insurance benefits than his wife,[5] and, in addition, that he had received at least one-half of his support from his wife when she began receiving old-age or disability benefits or when she died. A female of retirement age who applies for benefits on the basis of her husband's earnings account must also demonstrate that her entitlement to old-age insurance benefits is less than her husband's, but she need not show that at the time of eligibility her husband furnished half of her support. Thus the test for husband's and wife's, and for widow's and widower's, insurance benefits are the same except

[5] In the case of husband's and wife's insurance benefits, it must be shown that the applicant's entitlement to old-age insurance benefits is less than one-half the spouse's; in the case of widower's and widow's insurance benefits, it must only be shown that the applicant's entitlement to such benefits is less than the spouse's. See Section 202(b)(1)(E), (c)(1)(D), (e)(1)(E), and (f)(1)(E).

that the dependency of the man must be proven, while the dependency of the woman is presumed.

This legislative classification reasonably implements the objective of Congress to confer Social Security benefits upon spouses who were dependent upon the primary wage earner.[6] As this Court has observed, "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses * * * is not entirely without empirical support. See *Kahn* v. *Shevin*, 416 U.S. 351, 354 n. 7 (1974)." *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 645. Indeed, despite the changing role of women in the work force, it is still more probable than not that a married woman will not be self-supporting. In 1971, less than half—41.5 percent—of married women worked (see *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 689, n. 23; and *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 643, n. 11), and in less than one out of every eight families in which the wife works does she earn more than half the family income.[7] Thus the presumption of the wife's dependency is not irrational, especially where it has already been shown

[6] The legislative history of the statutes involved here make plain that their purpose was to replace support lost to the spouse upon the retirement or disability of the wage earner. See, *e.g.*, S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950); Report of the 1949 Advisory Council on Social Security, S. Doc. No. 203, 80th Cong., 2d Sess. 38 (1945)

[7] In no more than 12 percent of those families where the wife works does the wife contribute more than 50 percent of the total family income. Linden, *Women: A Demographic, Social, and Economic Presentation* 34 (1971).

that her entitlement to old-age insurance benefits, based upon covered employment, is less than her husband's. A similar presumption on behalf of husbands would not be equally rational. Not only are men more likely to be self-supporting, but in those cases where the husband's primary insurance is less than his wife's, there is a substantial likelihood that the explanation is not that the husband was in fact economically dependent upon his wife but rather that his earnings were outside the coverage of the Social Security Act. See note 4, *supra*. For this reason it is appropriate to require the husband to prove dependency as a condition of receiving dependency benefits.

In holding the challenged statutes unconstitutional, the courts below regarded this Court's decisions in *Wiesenfeld* and *Frontiero* as dispositive. Those decisions, however, are not controlling here. In *Wiesenfeld*, the Court held without rational basis a legislative classification that authorized the payment of benefits, on the basis of a deceased wage-earner's account, to surviving mothers with children in their care, while denying such benefits to similarly situated fathers. The Court noted that the purpose of the mother's benefits was to aid children as dependents by providing "children deprived of one parent with the opportunity for the personal attention of the other * * *." 420 U.S. at 648-649. Congress' provision of benefits only for mothers, and not for fathers, was unrelated to that legislative objective. 420 U.S. at 648-652.

The provisions at issue here, however, have no similar overriding social objective beyond the satisfaction of the economic needs of the individual dependent beneficiary. The benefits they provide are intended to replace the economic support lost by a defendent spouse upon the death, retirement or disability of the wage earner.[8] Moreover, a fatal flaw in the provision at issue in *Wiesenfeld* was that it denied the male applicant any "opportunity to show, as may well have been the case, that he was dependent upon his wife for his support * * *." 420 U.S. at 645. In contrast, the statutory scheme in question here provides that opportunity.

Nor does this Court's decision in *Frontiero* require invalidation of the statutory scheme here. In *Frontiero*, this Court held unconstitutional certain statutes (37 U.S.C. 401, 403; 10 U.S.C. 1072, 1076) that automatically provided a married serviceman with dependent's benefits for his wife, but provided such benefits to a married servicewoman only if she established that she provided more than one-half her husband's support. Under those statutory provisions, female officers had to prove their spouse's dependency merely in order to receive compensation equal to that

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[8] Actual or presumed dependency is a central feature of all dependents' benefits under the Act where the purpose is to compensate for the loss of the wage-earner's support. Thus, in addition to the benefits afforded husbands, wives, widows, and widowers of retirement age, dependency is also an underlying requirement for parents' benefits (42 U.S.C. 402(h)), children's benefits (42 U.S.C. 402(d)), and divorced wife's benefits (42 U.S.C. 402(b)).

granted male officers. The Court concluded that that distinction did not comport with the underlying congressional purpose of providing, through fringe benefits, compensation for service as an officer roughly comparable to compensation for equivalent civilian employment, for it resulted in servicewomen receiving less compensation for equivalent work in an identical family situation. In that context the distinction between actual and presumed dependency was held to be discriminatory and unrelated to the objective of the military compensation scheme.

In contrast to the situation in *Frontiero*, dependency, not compensation, is the key to the meaning of the legislative program in question here. These special benefits for men and women of retirement age are intended to supplement their primary insurance benefits, if any, when the death or retirement of the principal wage earner results in a loss of, or reduction in, necessary support. The benefits are intended for aged dependents who have suffered a loss of "support, or a potential loss of support, when the worker's earnings are cut off." Report of the 1971 Advisory Council on Social Security, H.R. Doc. No. 92-80, 92d Cong., 1st Sess. 22 (1971).[9]

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[9] See also testimony of Robert M. Ball, Acting Director of the Bureau of Old-Age and Survivors Insurance, Hearings Before a Subcommittee of the Committee on Ways and Means of the House of Representatives on the Analysis of the Social Security System, 83d Cong., 1st Sess. 569 (1953); H.R. Rep. No. 728, 76th Cong., 1st Sess. 7, 11 (1939) (concerning original legislation providing benefits to members of wage-earner's family).

In legislating these dependency benefits, Congress did not exceed its powers by extending to women, but not to men, the presumption of dependency.[10] The distinction Congress has drawn is grounded in empirical evidence and reflects the social realities that pertained during the working lives of these retired men and women, and it amply satisfies the rational basis test that, under this Court's decision in *Salfi*, governs due-process challenges to legislative classifications of this kind.

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[10] We recognize that the presumption afforded to women may result in the payment of benefits to some women whose earnings were not covered by the Social Security Act and who were in fact self-supporting. But such over-inclusiveness does not render constitutionally impermissible the imposition upon men of a burden of proving dependency. Congress could reasonably assume that the administrative costs that would be entailed by requiring dependency determinations for all wives and widows of retirement age might exceed the amount of benefits paid as a result of any over-inclusiveness resulting from a presumption of dependency. In contrast, no such assumption could reasonably have been made respecting the costs of extending the presumption to men. See *Salfi, supra*, slip op. 24-25, 28, 29-33.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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WILLIAM KANTER,
ROBERT S. GREENSPAN,
Attorneys.

NOVEMBER 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1188

LEON GOLDFARB, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

MEMORANDUM AND ORDER

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Of Counsel

Leonard P. Moore, C.J.; Jack B. Weinstein, D.J.; and Orrin G. Judd, D.J.

Per Curiam:

Seventy year old Leon Goldfarb applied for social security survivor's benefits after the death of his wife. She had been paying social security taxes for some twenty-five years. His employment had not been covered by social security. Mr. Goldfarb's claim was denied for the reason that,

> "You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she did."

It is conceded that had the gender of these spouses been reversed, the plaintiff would have been granted social security benefits. A female need not show "at least one half support from" the deceased spouse. *See* 42 U.S.C. § 402(b), (c)(1)(C), (e), (f)(1)(D). Thus, the statute and its application to this plaintiff, "deprive women of protection for their families which men receive as a result of their employment." Weinberger v. Wiesenfeld, —— U.S. ——, ——, 95 S. Ct. 1225, 1232, 43 L. Ed. 2d 514 (1975). *See also* Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

This case is controlled by *Wiesenfeld*:

> "[S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation

> premised upon assumptions as to dependency . . ., the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men."

—— U.S. at ——, 95 S. Ct. at 1232, 43 L. Ed. 2d at 523.

Whatever may have been the ratio of contribution to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple or one of them retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

Plaintiff's request for a declaratory judgment that 42 U.S.C. § 402(b), (c)(1)(C), (e), (f)(1)(D), is unconstitutional insofar as it discriminates against widowers on the basis of sex must be granted. The application for certification as a class is denied. *See* Wiesenfeld v. Secretary of Health, Education and Welfare, 367 F. Supp. 981, 986-987 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, —— U.S. ——, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975). The matter is remanded to the Secretary of Health, Education and Welfare who is directed to make payments

for the period during which Mr. Goldfarb would have been qualified to receive benefits but for the discrimination against widowers now held to be unconstitutional.

So ordered.

Dated: Brooklyn, New York
June 17, 1975

/s/ Leonard P. Moore
LEONARD P. MOORE, C.J.
Concurring in separate opinion.

/s/ Jack B. Weinstein
JACK B. WEINSTEIN, D.J.

/s/ Orrin G. Judd
ORRIN G. JUDD, D.J.

MOORE, Circuit Judge (concurring)

In light of the Supreme Court's decisions in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) and *Weinberger* v. *Wiesenfeld*, —— U.S. —— (1975) I feel bound to reluctantly concur but not without deploring the necessity of judicial exercise of the legislative functions of government. The Congress presumably, after giving the problem due consideration and weighing the pertinent facts, enacted the legislation in question. If there are to be presumptions it would be but fair to the legislative branch to presume that their enactments were designed to be rationally related to the goal which they desired to achieve. By this decision it seems to me that the court is creating a new class of beneficiaries which Congress did not create.

Reference is made by defendant to an estimate that if all persons eligible for the benefits sought by plaintiff received the payments requested, the cost would be a third of a billion dollars. In a day in which the public press speaks of national deficits of sixty to one hundred billion dollars, a mere one-third of a billion may seem *de minimis*. However, in addition to the classification powers thus assumed by the courts, any such result would, in effect, extend the court's powers to the public purse. In short and to paraphrase a Biblical saying; I would render unto Congress the things that are Congress* and thus

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*St. Mark, 12.17

avoid a judicial invasion of the Congressional field, leaving to Congress the privilege to enact such legislation as may be just, proper and constitutionally well based under the circumstances.

/s/ Leonard P. Moore
LEONARD P. MOORE, U.S.C.J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 74 C 1188

LEON GOLDFARB, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the judgment entered in this action by the three-judge District Court on June 17, 1975.

Dated at Brooklyn, N.Y., this 15th day of July, 1975. 1975.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
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Brooklyn, N.Y. 11201
Attorney for the defendant
Secretary of Health, Education and Welfare

By: /s/ Paul B. Bergman
PAUL B. BERGMAN
Assistant U.S. Attorney
Chief, Appeals Division

APPENDIX C

Pertinent provisions of Title II of the Social Security Act are as follows:

Section 202(c), 42 U.S.C. 402(c):

> (c)(1) The husband (as defined in Section 216 (f)) of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62,
>
> (C) was receiving at least one-half of his support * * * from such individual [at the time she became entitled to old age benefits]
>
> * * * * *
>
> and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, * * *
>
> (D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit * * *.

Section 202(f), 42 U.S.C. 402(f):

> (f)(1) The widower * * * of an individual who died a fully insured individual, if such widower—
>
> (A) has not remarried,
>
> (B)(i) has attained age 62 * * *
>
> (C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, * * *
>
> (D)(i) was receiving at least one-half of his support * * * from such individual at the time of her death * * *
>
> (E) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than [82½ percent of] the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit * * *.

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